

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 27, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

D.A.S. SAND AND GRAVEL, INC.

:
:
:
:
:
:
:
:

Docket No. YORK 2001-67-M
A.C. No. 30-03254-05508

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 29, 2001, the Commission received from D.A.S. Sand and Gravel, Inc. ("D.A.S.") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, D.A.S. asserts that it never received a copy of the proposed penalty assessment. Mot. D.A.S. states that it first received notice of the proposed penalty assessment on June 11, 2001, when it received a letter from the Department of Labor's Civil Penalty Compliance Office, stating that D.A.S. was delinquent in the payment of the proposed penalties. *Id.* It further contends that it was unable to match the number assigned to the proposed penalty assessment to any of the citations it had received. *Id.* D.A.S. requests an opportunity for a hearing on the penalty assessment. *Id.* D.A.S. attached to its request a copy of the correspondence from MSHA dated June 6, 2001.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied “so far as practicable,” Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of D.A.S.'s position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See John Richards Constr.*, 22 FMSHRC 1054, 1055 (Sept. 2000) (remanding to judge to determine whether relief from final order was appropriate where operator alleged that it never received copy of the proposed penalty assessment); *Bauman Landscape, Inc.*, 22 FMSHRC 289, 290 (Mar. 2000) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

David Scheer, President
D.A.S. Sand & Gravel Inc.
1444 Hydeville Road
Newark, NY 14515

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006